83-2091

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD DEY. MANNING, as Executor of Norman Norell, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD DEY. MANNING,
as Executor of Norman Norell, Deceased, a Petitioner Pro Se
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66 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Does the decision of this Court in Flora v. United States, 357 U.S. 63 (1958), aff'd on rehearing, 362 U.S. 145 (1960), bar, by reason of lack of subject matter jurisdiction, an action for refund of United States estate taxes paid by a decedent's estate under the installment election provided for in United States Internal Revenue Code Section 6166 (26 U.S.C. 6166) until all of the tax has been paid in full ?

(2) If yes, may the Department of Justice and the Internal Revenue Service, by unpublished administrative ruling, enlarge the jurisdiction of the district courts to permit, under circumstances fixed by such agencies, the bringing of such an action ?

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IN THE

SUPREME COURT OF THE UNITED STATES
October Term 1984

No.....

RICHARD deY. MANNING, as Executor
of Norman Norell, Deceased,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States in the above entitled action.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported. The opinion of the United States District Court for the Southern District of New York is also unreported. Copies of both opinions are annexed as Appendices A (including Order denying rehearing) and B respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 by reason of the fact that the United States Court of Appeals for the Second Circuit has erroneously construed the decision of this Court in Flora v. United States, 357 U.S. 63 (1958), aff'd on rehearing, 362 U.S. 145 (1960) (herein referred to as Flora).

The date of the Judgment of the United States Court of Appeals for the Second

Circuit sought to be reviewed is December 14, 1983, and petition for rehearing was denied March 22, 1984.

QUESTIONS PRESENTED FOR REVIEW

(1) Does the decision of this Court in Flora bar, by reason of lack of subject matter jurisdiction, an action for refund of United States estate taxes paid by a decedent's estate under the installment election provided for in United States Internal Revenue Code Section 6166 (26 U.S.C. 6166) until all of the tax has been paid in full ?

(2) If yes, may the Department of Justice and the Internal Revenue Service, by unpublished administrative ruling, enlarge the jurisdiction of the district courts to permit, under circumstances fixed by such agencies, the bringing of such an action ?

STATEMENT

This action was instituted in District Court for refund of United States estate taxes paid to the United States Internal Revenue Service ("IRS") in the years 1974, 1975 and 1976. Jurisdiction was invoked pursuant to 28 U.S.C. § 7422.

The decedent, Norman Norell, died in 1972. The Estate timely filed its estate tax return with IRS on October 23, 1973, showing a net tax due of $205,725. IRS subsequently, in 1975, determined a deficiency in the amount of $112,440, as to which the Estate consented.

Petitioner elected under the provisions of Internal Revenue Code ("IRC") § 6166 to defer payment of a portion of the tax by paying it in ten annual installments, as permitted by said § 6166.1/

The Estate timely paid the non-deferred portion of the estate tax as well as the installments (and the increased non-deferred and deferred portions thereof, per the deficiency assessment in 1975), up to the installment due July 25, 1977. The Estate did not make that payment and, on August 3, timely filed a claim for refund of $35,262 of the tax already paid.

On October 17, 1977, IRS by letter, revoked the Estate's installment election; on July 14, 1978, the Estate's claim for refund was disallowed by IRS.

Petitioner then commenced this action seeking a refund of the $35,262 tax paid and alleging that none of the remaining deferred balance of $96,786 was due and owing.

Proceedings before the District Court

The respondent moved to dismiss the

complaint for lack of jurisdiction on the basis of Flora.

In the course of the hearings before the District Court on the motion the Court ordered the production, in camera, and later to petitioner, of unpublished IRS General Counsel's Memorandum 35696, dated February 27, 1974 ("GCM"--because of the importance of the GCM to this Petition, it is annexed hereto as Appendix C).

Attached to the GCM was a Memorandum from the IRS Refund Litigation Division ("RLD") dated January 23, 1974, which referred to interdepartmental consideration since 1963 of the applicability of Flora to suits for refund made by § 6166 taxpayers who had not paid the entire deferred balance at the time the claim or suit was filed. The GCM stated the following concerning the precise issue

presented in this case (emphasis supplied):

"...[It is] the decision of [RLD] and the Department of Justice not to raise a Flora defense...when a Code § 6166 election has been made, but taxpayer has brought suit to challenge the correctness of the amount of its liability before payment of all of its Code § 6166 installments." (App. C, p.2).

"...[RLD] is in 'complete agreement' with Justice, since raising a Flora defense would negate the relief afforded taxpayers under Code § 6166 and penalize taxpayers who elect to claim the benefits of that section by barring them from instituting suit to recover a part of the taxes paid or by forcing them to wait 10 years before suit may be instituted." (Id. p.4-5).

After review of the GCM, petitioner argued that to apply Flora to his case, which was apparently the first time Flora had been invoked in an estate tax case (for the reasons stated in the GCM) would violate the Estate's Constitutional right to due process and equal protection of the law.

Decision of the District Court

The District Court held, in an opinion from the bench, that the complaint must be dismissed because of Flora. However, the Court did not hold that Flora applied in every case under § 6166:

> "But according to Flora, to proceed in this court the tax must be fully paid. So the essential question before me was what full payment under Flora means in the context of this case.
>
> "The government urges that it means at least that installment payments must be kept up to date, and that installment payments must be fully paid at the time the suit is brought.... (App. B, p.5).

The plaintiff here would not have been entitled to receive treatment in the way of a vesting of jurisdiction under...[the GCM] because at the time he brought suit, his installments were not current[*]...." (Id. p.10).

The Court then stated that had petitioner paid the July 25, 1977 (and subsequent installment payments) he could have met the government's Flora defense with an "equal protection argument." (Id., p.12).

Decision of the Court of Appeals

The Court of Appeals affirmed the decision of the District Court in a Memorandum Opinion which did not clear up the question as to when, and under what circumstances, Flora applies in a § 6166 suit for refund.

However, the Court of Appeals, as the District Court, indicated that the GCM had somehow altered the effect of Flora on the jursidiction in a § 6166 refund case (emphasis supplied):

"While it is true that Flora did not specifically address those circumstances where a taxpayer has, as here...[made a § 6166 election] such circumstances might call for application of a somewhat modified jurisdictional rule such as a requirement only that the taxpayer be current in his payments,2/ that is simply not the case here at bar....

---

2. Such a requirement is evidently all that is necessary as a matter if internal IRS policy under...[the GCM] so as to avoid placing the installment-electing taxpayer in a 'catch 22' situation." (App. A, p.5).

There can be no question but that the decisions of both the District Court and the Court of Appeals opinions were based on the fact that the Estate's then current installment (due one week before the claim for refund was filed by the petitioner2/) had not been paid.

It cannot be emphasized too strongly that nowhere in the GCM is there any reference whatsoever to whether the installments must be kept current or not. Indeed, the case under consideration in the GCM, which concerned an increased assessment after the § 6166 election had been made, which the estate there involved intended to oppose, would appear to assume that the over assessment would not be paid until the validity thereof was established in the litigation there considered.

REASONS FOR GRANTING THE WRIT

I.

Flora Limited the Jurisdiction of the District Courts in Tax Refund Suits; Therefore it Applies Equally to § 6166 Suits, and Neither IRS nor the Justice Department has the Power to Enlarge Such Jurisdiction,

or

Flora Does Not Apply to § 6166 Suits and the Court of Appeals Erred in Affirming the Dismissal of the Complaint herein.

This case involves an important question of Federal law which has not been, and should be decided by this Court, viz, the jurisdiction of the district courts to hear estate tax refund cases under § 6166 prior to payment of all amounts due thereunder.

There is no conflict among the Circuits, nor even a body of decisions by the district courts on the matter because IRS and Justice have not, as a matter of policy, interposed a Flora defense in refund cases involving a § 6166 taxpayer.

Petitioner has quoted liberally from the GCM and the Opinions of the Courts below to demonstrate that, beyond any doubt, both the lower Court and the Court of Appeals decided that:

(1) Flora, which imposes a limitation on the jurisdiction of the district courts, does apply to refund cases under IRS § 6166;

(2) the IRS and Department of Justice have created an exception to the applicability of Flora, and, in effect, granted jurisdiction to the district courts in § 6166 cases where the

taxpayer's payments were current, in a policy memorandum which was not published because it dealt with jurisdiction.3/

Petioner finds no fault with the reasoning and conclusions set forth in the GCM and RLD Memorandum. The legislative history of § 6166 makes clear that it was designed to benefit, not penalize, those estates which qualified for the installment payments provided for therein.4/

The IRS and Justice Department clearly perceived that to apply Flora to suits for refund in § 6166 cases would "negate the relief afforded [by § 6166] and penalize taxpayers who elected to claim the benefits of that section by barring them from instituting suit to recover a part of the taxes paid or by

forcing them to wait 10 years before suit may be instituted." (App. C, p.13).

For that reason IRS and Justice concluded:

"We now also believe that the courts most probably would not sustain a defense based on Flora and prejudice the relief granted by Congress in Code § 6166." (Id. 6). 5/

The attached RLD Memorandum explained the reason for the decision reached in the GCM (paragraphing added):

" [§ 6166] ...taxpayers...would be required to file a claim for refund for each payment within two years thereof."

" If...[IRS] should disallow any of the claims so filed...the time for the taxpayer to file suit would expire after the expiration of two years from the date of such disallowance."

"...[U]nder the Flora rule, if the taxpayer attempted to institute suit within such period we would be forced to assert that the suit was jurisdictionally defective because the tax had not been paid in full."

"Thus, the taxpayer would be effectively trapped and would be forever barred from recovering at least some of the sums paid in the earlier installments." (App. C, p.13).

After all the years of examination and reflection on this matter, and after having reached the conclusions set forth above, the IRS and Justice Department appear to have made an "about face" in this matter.

In the course of the argument in the District Court, the respondent called to the Court's attention a decision of the Court of Claims in Rodewald v. United States, 82-2 USTC Par. 9664 (1982), in which the respondent had (at about the same time as the motion was made to dismiss the complaint herein) succesfully asserted the Flora defense against a §6166 taxpayer who was then current on all of his obligations. About that the District Court observed:

"...the Rodewald case... is apparently inconsistent with the internal memorandum which the government itself drew to my attention." (App.B, p.1112).

It should be of interest to this Court

that the instant case and the Rodewald case appear to be the only two cases in which the jurisdictional question has been raised by the government in a §6166 case since the Court's decision in Flora.

The IRS and Justice Department could have sumbitted this issue to decision by some court before making such a far reaching decision concerning the jurisdiction of the district courts (and what this Court might, or would, decide in that regard). But they did not choose to do so, and for a period of many years continued to mislead taxpayers by not raising, or calling attention to, this hidden "booby trap" which was awaiting the time when the IRS or Justice changed their views, as they appear now to now have done (or some court, sua sponte

decided the jurisdictional issue differently than predicted.

And yet, at this late date, more than twenty years after enactment of § 6166 and the decision in Flora the IRS and Justice Department still have the taxpayers "in the dark" as to what their remedy may be if they make the election under § 6166 and later find that their tax was overassessed.

In the absence of a decision by this Court, such a taxpayer's only remedy is to learn, too late, that he or she is in the "catch 22" situation referred to by the Court of Appeals. That situation was described in the RLD Memorandum as:

"...[T]he taxpayer would be effectively trapped and would be forever barred from recovering at least some of the sums paid in the earlier installments."(App. C, p.13)

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II.

The Application of Flora to a § 6166 Taxpayer Without the Taxpayer Having Been Given Adequate Warning of the Consequences thereof Constitutes a Denial of Equal Protection and Due Process of Law.

As pointed out above, § 6166 was, in the eyes of Congress, intended as a benefit to small businesses and the stockholders thereof6/. certainly it was not enacted for the purpose of creating a Trap into which an unsuspecting executor might stray without warning.

For so many years, the IRS and Justice Department have deliberately

(a) refrained from presenting this jurisdictional issue to the Courts,

(b) refrained from taking a public position on this issue in order that the

attention of the estate tax bar, and indeed, of Congress, could have been directed to the problem and a possible remedy therefor,

(c) decided upon their own unpublished "extra-judicial" remedy for the problem,

(d) recanted the earlier decision, in this and at least one other suit, without publication of the change,

and have thus been responsible for the lack of general public knowledge of the potentially dire consequences of making the § 6166 election.7/

Petitioner respectfully submits that, under the circumstances of this case (and all similar cases under § 6166) the IRS and the Justice Department have transcended the Constitutional boundaries of equal justice under the law and due process of law.

CONCLUSION

WHEREFORE, Petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination on a date certain to be therein named, a full and complete transcript of all proceedings, of the case on its docket Number 83-6130 entitled Richard deY. Manning, as Executor of Norman Norell, Deceased, Plaintiff-Appellant against United States of America, Defendant- Appellee; and that the Order of the United States Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioner may have such other and

further relief in the premises as to this Court may seem just and proper.

Dated: New York, New York
June 19, 1984

Respectfully submitted,

RICHARD deY. MANNING, as
Executor of Norman Norell,
Deceased, Petitioner pro se

FOOTNOTES

1/ IRC § 6166 (a) (Pub. L.85-866, Title II, Sec. 206(a), (Sept. 2, 1958), which was effective in 1973, provided that where "the value of an interest in a closely held business which is included in determining the gross estate of a decedent...exceeds either--35 per cent of the value of the gross estate of such decedent...the executor may elect to pay part or all of the tax...in two or more (but not exceeding 10) equal installments." Here, the estate consisted in part of the stock of Norman Norell, Inc., a fashion design house in New York City.

2/ The tax did not immediately accelerate so that it was due and owing on the day the installment was not paid, as argued by the respondent below. The tax did not become due until the IRS revoked the § 6166 election of the Estate on October 17, 1977, after the claim for refund had been filed. Lake Shore National Bank v. Coyle, 419 F.2d 958, 961 (6th Cir. 1969).

3/ The GCM concludes with a statement that its "revised position on Flora" is not to be published because of its "jurisdictional nature". (App. C, p.6).

4/ See H. Rep. 2198, 85th Cong.,2d Sess. (1958):"...[Y]our committee hopes that by spreading out the period over which the estate tax may be paid, it will be possible for the estate tax in most cases to be paid out of earnings of

the business, or at least will provide the heirs with time to obtain funds to pay the Federal estate tax without upsetting the operation of the business." Cf. Lake Shore National Bank v. Coyle, supra (refers to "the generous motives which prompted Congress to grant relief under section 6166").

5/ The RLD Memorandum was more positive: "We do not believe that any court would sustain a defense based on Flora". (App C,p.13).

6/ The tax deferral option in § 6166 had certain beneficial results to the government as well. If the estate did not have the funds to pay the estate tax, then the small business would most likely be sold at a "fire sale" price, thus reducing its value (and the estate tax incident thereto) over that of a "going concern".

7/ Petitioner is not asserting any claim of estoppel the government, however much its agents may be responsible for their acts of the past twenty years regarding this matter. Cf. Estoppel Against the Government in Federal Tax Cases, 30 N.C.L.R. 356 (1952).

APPENDIX

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fourteenth day of December, one thousand nine hundred and eighty-three.

Present:
Hon. James L. Oakes,
Hon. Thomas J. Meskill,
Circuit Judges.
Hon. Edward R. Neaher,
District Judge.*

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Richard deY. Manning, as Executor
of Norman Norell, Deceased,
Appellant,
v.
United States of America,
Appellee.

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*Of the Eastern District of New York, sitting by designation.

Opinion of Court of Appeals

ORDER

This is an appeal of a judgment of the United States District Court for the Southern District of New York, Vincent L. Broderick, Judge, dismissing a complaint for refund of federal estate taxes for lack of subject matter jurisdiction. We affirm.

Appellant Manning is the executor of the estate of Norman Norell, who died in 1972. In 1973 Manning filed the estate's tax return and declared a gross estate value of approximately $965,000 and a net tax due of $205,725. Subsequently the Internal Revenue Service (IRS) determined a deficiency in estate taxes of $112,440. The estate did not at that time contest the IRS's finding of deficiency, consenting to the assessment. The estate did, however, elect under I.R.C. § 6166, 26 U.S.C. § 6166 (1976) to pay the tax in

ten annual installments, an election which was approved by the IRS.

After making the first three payments, the estate failed to pay the installment payment due July 25, 1977. On August 3, 1977, the estate filed an administrative claim with the IRS, asserting that the estate had been overassessed by more than $400,000, resulting in an overassessment of tax due of $132,048. On August 4, 1977, the § 6166 installment election was revoked by the IRS as a result of the nonpayment, such that the entire assessed tax was accelerated and immediately due. 26 U.S.C. § 6166(g)(3) (1976),1/ see Treas. Reg. § 20.6166-3(c), T.D. 6522, 25

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1. For estates of decedents dying after December 31, 1981, there is a six-month grace period during which, subject to a penalty, the installments may be caught up to date. 26 U.S.C. § 6166(g)(3)(B) (Supp. 1981). claim for refund followed by this action in the district court in in June of 1978.

Fed. Reg. 13,888 (1960). The estate then, in August, 1977, filed an administrative claim for refund followed by this action in the district court in June of 1978.

We agree with the court below that there is no federal jurisdiction over this matter. In Flora v. United States, 362 U.S. 145 (1960), the Supreme Court held that a federal district court has jurisdiction under 28 U.S.C. § 1346(a)(1) of a taxpayer's refund suit only when the taxpayer has made "full payment" of the tax as assessed. Id. at 177. This ruling applies to estate taxes, Horne v. United States, 519 F.2d 51, 52 (5th Cir. 1975)(per curiam). While it is true that Flora did not specifically address those instances where a taxpayer has, as here, elected to make annual installment payments under an appropriate statutory provision permitting him to do so, and

while such circumstances might call for application of a somewhat modified jurisdictional rule such as a requirement only that the taxpayer be current in his payments,2/ that is simply not the case here at bar. The appellant estate not only failed to make "full payment" under a strict reading of Flora, it was not even current in its annual payments. To ask this court to create an "exception" to Flora in a case such as this, where a taxpayer is not up to date in its installments, is, in effect, to ask us to overrule Flora, since all a taxpayer would have to do in order to sidestep completely the jurisdictional requirement of full payment would be first to make a § 6166 election, followed by a failure to

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2. Such a requirement is evidently all that is necessary as a matter of internal IRS General Counsel Memorandum 35696 so as to avoid placing the installment-electing taxpayer in a "catch-22" situation.

make any payments, and then to bring suit in federal court.

Of course we decline so to rule. The ruling of the court below is, accordingly, affirmed.

Affirmed.

/s/ James L. Oakes

/s/ Thomas J. Meskill

Circuit Judges.

/s/ Edward R. Neather

District Judge.

APPENDIX A

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United State Courthouse, in the City of New York, on the 22nd day of March one thousand nine hundred and eighty-four.

RICHARD deY. MANNING, as Executor Under the Will of NORMAN NORELL, Deceased,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 83-6130

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant, Richard deY. Manning, etc.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED. /s/
Elaine B. Goldsmith,
Clerk

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
RICHARD DeY. MANNING, as
Executor of NORMAN NORELL,
Deceased,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.
----------x

DECISION

78 Civ.
2903 (VLB)

April 15, 1983
2:55 p.m.

Before:
HON. VINCENT L. BRODERICK,
District Judge

APPEARANCES:

MANNING & CAREY
Attorneys for Plaintiff

RICHARD MANNING
Of Counsel

JOHN S. MARTIN, JR.
United States Attorney

LEONA SHARPE
Assistant United States Attorney

Opinion of District Court

THE CLERK: Richard Manning versus United States.

THE COURT: I'm prepared to rule now on the defendant's motion to dismiss for lack of subject matter jurisdiction.

I should say at the outset that this case has given me a great deal of trouble. The plaintiff has made arguments which sound essentially in equity, which, in my judgment, required very careful and thoughtful consideration. I've given that careful and thoughtful consideration. And I have finally determined that the defendant's motion to dismiss for lack of subject matter jurisdiction must be granted.

I shall not review the facts in any great detail. They are set out in the papers, and there is very little in the way of dispute, if any dispute, with

respect to those facts.

The plaintiff was appointed executor of the estate of Norman Norell in January of 1973 and opted to pay estate taxes in installments under Internal Revenue Code provision 6166.

Those payments were to be made over a period of ten years. The last installment payment was made in 1976. More than a year later, the plaintiff filed an application for refund of estate taxes.

I'm not sure how well this has been spelled out in the papers, but it certainly has been spelled out in the course of colloquy in this case. At the time the amount of estate taxes was determined by the Internal Revenue Service, it is my understanding that the plaintiff essentially agreed with that determination and that it was only operation over the ensuing years that

persuaded him that that original agreement on his part was in error, and that the amount of estate tax that had been determined was in error.

The plaintiff's claim for refund was filed internally within the Internal Revenue Service on either August 1st or August 3rd, 1977. On October 17th of 1977, the plaintiff's election to pay in installments was revoked for nonpayment of an installment by the Internal Revenue Service, pursuant to Section 6166.

This action was begun in June of 1978. Thereafter, the plaintiff's claim for refund was disallowed.

It has been the defendant's contention that this court lacks subject matter jurisdiction under the Supreme Court opinion in Flora versus the United States. Flora held in substance that full payment of an assessed tax was the

jurisdictional prerequisite to suit in this court. Flora refers to the two tracks which a paxpayer may follow. He may proceed in the tax court without paying a tax, or he may pay the tax and proceed in this court, and I believe in the Court of Claims.

But according to Flora, to proceed in this court, the tax must be fully paid. So the essential question before me was what full payment under Flora means in the context of this case.

The government urges that it means at least that installment payments must be kept up to date, and that installment payments must be fuly paid at the time that suit is brought. That suggestion is directly related to an internal memorandum of the Internal Revenue Service, GCM 35696. I will be referring to that as I go along.

Opinion of District Court

The record before me indicates that the installment payments under the installment payment agreement were not current, either at the time claim was made for a refund or at the time this suit was brought.

Now, the plaintiff has argued that the actual value of the business was lower than the assessment and that the tax was fully paid if reference is made to that lower value. This definition of full payment was specifically rejected by the Supreme Court in the Flora case. In that case, the Court made clear that a payment of the tax amount that the taxpayer concedes is due, but not the amount that the Internal Revenue Service claims is due, is not full payment.

In treating this matter, the Court referred to the two alternatives (that I have already discussed) which are open to

the taxpayer, saying, and I quote, "The result is a system in which there is one tribunal for prepayment litigation and another for postpayment litigation, with no room contemplated for a hybrid of the proposed by petitioner."

I have wrestled at some length with the internal memorandum of the Justice Department, GCM 35696. That memorandum deals with the question which it posits as the following, and I quote: "Whether once an election under Int. Rev. Code of 1954, Section 6166, has been made to pay estate tax and any liability thereon in installments, the total tax liability must be paid before a suit can be brought in district court to challenge the correctness of the amount of liability." That memorandum provides, apparently for internal Internal Revenue Service consumption, that a Flora defense, based

Opinion of District Court

on lack of subject matter jurisdiction, should not be raised when the taxpayer's installment payments are kept current. The rationale set forth in the memorandum is that, quote, "raising a Flora defense would negate the relief afforded taxpayers under Code Section 6166 and penalize taxpayers who elect to claim the benefits of that section by barring them from instituting suit to recover a part of the taxes paid, or by forcing them to wait ten years before suit may be instituted.

My problem with this internal memorandum is two-fold. In the first place, I read certain sections of Flora, particularly footnotes 34 and 37, as suggesting quite strongly that the option of requiring current installment payments -- let me correct that; that the option of treating current installment payments as full payment is not available.

Opinion of District Court

My second problem with this memorandum is that it suggests a power in the Internal Revenue Service, or in the Justice Department, which represents the Internal Revenue Service in litigation, which, in my judgment, does not exist. The thrust of this internal memorandum is that if installment payments are current and the taxpayer makes claim for refund, and presumably eventually sues in District Court, the Internal Revenue Service will not, with respect to the claim in court, raise a jurisdictional defense, to wit, raise the defense which the government has raised here, lack of subject matter jurisdiction.

I had not previously understood that a party had the power to vest or divest a court of jurisdiction. Jurisdiction either does exist or does not exist. And I have serious problems with the concept

of the government at its own whim or even as a matter of stated but internal policy, vesting or divesting the Court of subject matter jurisdiction.

The plaintiff here would not have been entitled to receive treatment in the way of a vesting of jurisdiction under this internal memorandum, because at the time he made claim and at the time he brought suit, his installment payments were not current. That fact is fairly clear.

Further consideration had to be given to this internal memorandum, however, because plaintiff has asserted that had he known of this memorandum, had he known that he merely had to keep payments current for jurisdictional purposes, he would have done so.

I think I should note in passing that the government has referred me to a recent case in the Court of Claims which

Opinion of District Court

is either Rodewald or Rosewald versus the United States.

As I read that case, the installments were current when the taxpayer brought suit. Yet the Court of Claims dismissed for lack of subject matter jurisdiction. The report of the case is fairly sketchy, but apparently the taxpayer in that suit attempted to raise an argument predicted upon internal documents within the Internal Revenue Service, and I have to conclude that the reference must have been to GCM 35696. The conclusion of the court was that for any consideration to be given to the Internal Revenue Service's internal memoranda, some other forum must be found. In the context of this case, I fail to see the significance of the Rodewald case, which is apparently inconsistent with the internal memorandum

which the government itself drew to my attention.

The plaintiff has argued here that he has been denied equal protection. My problem with the argument is that he was not similarly situated to those taxpayers to whom, presumably, this internal memorandum had application. He has asserted that, had he known that to endow this Court with jurisdiction he merely had to keep his payments current, he would have done so and that in that sense, he is similarly situated to installment-paying taxpayers who are up to date on their payments.

However, since the jurisdictional prerequisite under Flora has not been met, there was no prepayment and installments were not currently paid, I cannot entertain the argument without some other basis of jurisdiction.

Opinion of District Court

The plaintiff was aware that if he failed to keep payments current, then, under Section 6166, the entire tax would be accelerated and would be due.

There is no evidence before me that indicates that certain taxpayers had notice of the government's interpretation in this internalmemorandum that being current in installment payments would be regarded for government purposes in litigation as full payment. And in this respect, the plaintiff was no worse off than any other taxpayer.

It certainly does seem to me that had the plaintiff kept his installment payments current, he might have had an equal protection argument if the government then urged, as it is now urging, the bar of Flora. In that situation, in the situation of being current in installment payments, he could argue that any attempt

by the government to apply Flora in this case was a singular application with equal protection implications.

Thank you ladies and gentlemen.

APPENDIX C

General Counsel's Memorandum

CC: I-22-74

FEBRUARY 27, 1974
Br4:MRChesman
G. C. M. 35696
xxxxxxxxxxxxxxxxxxxx
LAWRENCE B. GIBBS
Assistant Commissioner (Technical)
Attention:
Director, Miscellaneous Opinion of Court of Appeals
Special Tax Provisions Divisions

This is in reply to your memorandum (T:MS:AD) dated January 14,1974,in which you asked us to reconsider G.C.M. 33094, Extension of Time for Payment of Estate Tax, I-960 (Oct. 5, 1965).

ISSUE

Whether once an election under Int. Rev. Code of 1954, § 6166 [hereinafter cited as Code] has been made to pay estate tax and any liability thereon in installments, the total tax liability must be paid before a suit can be brought

General Counsel's Memorandum

in district court to challenge the correctness of the amount of liability.

CONCLUSION

G.M.C.33094 should be both modified and amplified to reflect the decision of Refund Litigation Division and the Department of Justice not to raise a Flora defense (Walter W. Flora v. United States, 357 U.S. 63 [1958], aff'd on reh. 362 U.S. 145 [1960] when a Code § 6166 election has been made, but taxpayer has brought suit to challenge the correctness of the amount of its liability before payment of all its Code § 6166 installments.

FACTS

Substantial deficiencies in estate tax have been asserted against the estate of xxxxxxxxxxxx. The estate qualified for and has elected to pay estate tax and any deficiencies in estate tax in install-

ments pursuant to Code § 6166. The executor disagrees with the proposed deficiencies and it is his intention to institute refund litigation in district court. Since the estate's assets are nonliquid, it cannot pay all of the deficiencies immediately.

ANALYSIS

In G.C.M. 33094,this office agreed with your conclusion that a "procedural" defense based on Flora 1/ should be raised by the Government when a Code § 6166 election has been made and taxpayer has brought suit to challenge the correctness of the amount of its

---

1/ In Flora, the Supreme Court held that a taxpayer must pay his deficiency in full before being entitled to bring a suit for refund in district court. In the second Flora opinion, Chief Justice Warren, "rested his opinion squarely on his own conception of the orderly administration of the tax laws, as he had only hinted on in the earlier judgment." (Lore, 12 J. Taxation 371 [1960]).

liability before payment of all its Code § 6166 installments. We wrote, however, that:

> The issue is...of a jurisdictional nature and the final decision as to whether it will be raised in any given case will necessarily be made by the Department of Justice. Accordingly, it appears that the Service should not issue or publish a ruling in regard to the matter, since such an outstanding ruling might hamper or embarrass the Department in the exercise of its discretion in litigating such a case.

We have been informed by Refund Litigation Division in a memorandum, xxxxxxxxxxx dated January 30, 1974, that the Department of Justice now believes a Flora defense should not be raised in district court when the taxpayer has made a Code § 6166 election as in xxxxxx Refund Litigation Division is in "complete agreement" with Justice, since raising a Flora defense would negate the relief afforded taxpayers under Code § 6166 and penalize taxpayers who elect to

claim the benefits of that section by barring them from instituting suit to recover a part of the taxes paid or by forcing them to wait 10 years before suit may be instituted.

We are attaching a memorandum, xxxxxxxxx dated January 23, 1973, from Refund Litigation Division to the Assistant Regional Counsel, Salt Lake City, Utah, which summarizes in chronological order the letters and memoranda,written since the publication of G.C.M. 33094,which led to the adoption of Refund Litigastion Division's new litigating position.

This office is in agreement with Refund Litigation Division and the Department of Justice since, as we have previously stated in G.C.M. 33094, we believe the decision of whether or not to raise Flora defense is jurisdictional in nature. We

now also believe that the courts most probably would not sustain a defense based on Flora and prejudice the relief granted by Congress in Code § 6166. We therefore disagree with the conclusion of your proposed memorandum to the District Director, Salt Lake City, Utah. Accordingly, the District Director should be informed that a Flora defense should not be raised under the facts of xxxxxx.

Publication of a revenue ruling detailing our revised position on Flora is still inappropriate because of the jurisdictional nature of the issue.

G.C.M. 33094 is hereby modified and amplified.

MEADE WHITAKER
Chief Counsel
By_____
G. NORRIS WATSON
Assistant to Director
Interpretative Division

Attachment:
Memorandum - xxxxxxxx dated Jan 23, 1973

General Counsel's Memorandum

Jan 23 1974
David R. Brennan,
Assistant Regional Counsel
P.O. Box 11139,
Salt Lake City, Utah 84111
Attn: Emory O. Langdon

Signed: John W. Holt

John W. Holt, Director
Refund Litigation Division
xxxxxxxxxx

In your memorandum of December 7,1973, you requested advice on the current litigating position of the Chief Counsel's Office with respect to the application of the Flora rule to estate tax installment payments which are made under section 6166 of the Internal Revenue Code of 1954.

This issue had first been considered by the National Office on January 22, 1963, when the xxxxxxxx District Director's office requested technical advice from the Tax Rulings Division as to whether an estate that has elected to pay its estate

tax liability by installments, pursuant to section 6166 of the Code, is required to pay the installments not yet due before it can bring a refund suit. The Tax Rulings Division proposed to hold that where a taxpayer had elected to pay in installments the Federal estate tax and any deficiency thereon, in accordance with the provisions of section 6166 of the Code, such installment payments and any deficiency attributable thereto must first be paid in full before the taxpayer could contest the tax or deficiency in the district court. This conclusion was based, in part, on their construction of section 7422(g) of the Code and decisional authority including Cheatham v. United States 32 U.S. 85 (1875), Old Colony Trust Company v. Commissioner, 279 U.S. 716 (1929), Lehr v. United States, 18 F.2d 81 (3rd Cir. 1927) and Flora v.

General Counsel's Memorandum

United States, 362 U.S. 145 (1960).

The proposed holding was sent to the Interpretative Division for their comments and concurrence, on May 16, 1963. The Interpretative Division had serious doubts as to the advisability of raising a jurisdictional defense on the basis of the Flora decision and also had considerable doubt that the Internal Revenue Service should rule on the question in view of the authority of the Department of Justice with respect to suits referred to them for defense. Consequently, the proposed ruling was forwarded to the Associate Chief Counsel (Litigation), by memorandum dated November 18, 1963, for the comments of the Refund Litigation Division and Department of Justice. By memorandum dated December 2, 1963, addressed to the Associate Chief Counsel, the Refund

General Counsel's Memorandum

Litigation Diision concluded that: (1) the technical advice letter reached the correct conclusion, (2) the service should rule on the problem and not leave it to the Department of Justice and (3) the ruling should not be published. The Department of Justice, in a letter dated November 23, 1964, stated that the Chief Counsel should make the initial determination on whether to ask that the defense be raised, and that because of a wide diversity of opinion on the issue a ruling should not be published.

Consequently, on October 5, 1965, G.C.M. 33094 was issued, holding that while the defense of nonpayment of an outstanding assessment should be raised, the issue is of a jurisdictional nature, and therefore the final decision as to whether it will be raised in any given case would necessarily be made by the

Department of Justice. Furthermore, it was held that the Service should not issue or publish a ruling in regard to the matter.

By letter dated April 23, 1971, the Department of Justice advised the Chief Counsel's office that in the past several years there have been several cases in which taxpayers have sued for refunds of portions of estate taxes paid, although the payment of the balance of the taxes had been deferred pursuant to section 6166 of the Code. Since no consistent position had been taken by the Government in those cases, the Department stated that it would not make any further attempt to extend the Flora rule to the above situation and that it would not rely on this defense in any pending or future cases,either by way of jurisdictional bar or as a bargaining

point in settlement negotiations. This position of the Department of Justice was reaffirmed in a letter dated June 28, 1971, addressed to the Chief Counsel.

The above position of the Deparment of Justice was further explained in a letter to the Chief Counsel dated April 14, 1972, in which the following was stated:

> The application of the Flora rule to cases in which the taxpayers have elected to pay the estate tax in installments presents such serious problems as to bring us to the conclusion that no defense asserting that rule should be raised. If we are to apply the rule literally, no suit for refund of estate taxes paid in installments (or even of a deficiency paid in a lump sum where the tax itself is paid in installments) could be instituted until more than 10 years had elapsed from the first payment. Furthermore, under the exisdting strict statutory rules, the taxpayers in such instances would be required to file a claim for refund for each payment within two years thereof. If the Service should disallow any of the claims so filed, whether as a matter of routine procedure or otherwise, the time for the taxpayer to file suit for refund would expire after expiration of two years from the date of such disallowance. Yet, under the Flora rule, if the taxpayer attempted to

institute suit within such period, we would be forced to assert that the suit was jurisdictionally defective because the tax had not been paid in full. Thus, the taxpayer would be effectively trapped and would be forever barred from recovering at least some of the sums paid in the earlier installments.

We do not believe that any court would sustain a defense based upon Flora under the circumstances prevailing in estate tax cases where the tax is paid in installments. Moreover, the assertion of a Flora defense in the circumstances described would effectively negate, at least in part, the relief which Congress ostensibly afforded in enacting section 6166. To penalize taxpayers who elect to claim the benefits of that section by barring them from instituting suit to recover a part of the taxes paid, or by forcing them to wait 10 years before suit may be instituted, appears to be so inconsistent with the legislative purpose as to indicate that the rule is not applicable under these particular circumstances.

In a letter to the Department of Justice (signed by the Associate Chief Counsel (Litigation)), dated April 14, 1972, the Chief Counsel's Office stated the following:

Upon reconsidering the matters, we are in complete agreement with the views

expressed in your letter to the effect that the Government should no longer assert a defense based on Flora in those cases in which the estates have elected to pay the tax in installments as provided by section 6166 of the Code and the issues raised appear to constitute bona fide contentions.

Consequently, the current litigating position continues to be that as stated in the Chief Counsel's letter to the Department of Justice dated April 14, 1972, namely that the Government will no longer assert a Flora defense in those cases in which the estates have chosen to pay the tax in installments, under section 6166 of the Code, and the issues raised appear to constitute bona fide contentions. It is obvious from the above, that the Department of Justice and the Chief Counsel's Office are in complete agreement with respect to the above position. Furthermore, both this office and the Department of Justice

believe that the Flora defense should not be employed in any fashion in this situation on an administrative level. It is not considered appropriate or necessary to require taxpayers to institute a law suit in order for the Government to then exercise its discretion in not applying the Flora defense. This conclusion was recommended by the Department of Justice in their letter dated November 23, 1964.

We contemplate advising the Interpretative Division of this position so that any confusion tht may remain concerning GCM 33094 may be eliminated.

We are enclosing copies of the letter from the Department of Justice dated April 14, 1972, as well as the letter from the Chief Counsel's Office to the Department of Justice, also dated April 14, 1972.

General Counsel's Memorandum

Enclosures:
cc DJ ltr. dtd. 4-14-72
cc Chief Counsel ltr. dtd. 4-14-72

cc: Mrs. Rowles - Rm. 4551

HJLevine/ggt
1/11/74